

**IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE**

<b>FILED</b> February 29, 2000 Cecil Crowson, Jr. Appellate Court Clerk
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OLYMPIA CHILD DEVELOPMENT	)	E1999-024480COA-
CENTER, INC.,	)	R3-CV
Appellant,	)	
v.	)	Appeal As Of Right From
RODNEY PARTON,	)	BLOUNT COUNTY CIRCUIT COURT
Appellee.	)	HON. W. DALE YOUNG

Kevin W. Shepherd, Maryville, Tennessee for the Appellant, Olympia Child Development Center, Inc.

Gregory F. Coleman and Candis D. Lasley, Knoxville, Tennessee for Appellee, Rodney Parton.

REVERSED AND REMANDED

SWINEY, J.

**OPINION**

This is an appeal of the Trial Court’s dismissing, prior to trial, claims asserted by Appellant Olympia Child Development Center, Inc., against Appellee Rodney Parton, cross-complainants in the Trial Court action. The claims on appeal center upon Appellant’s decline in its child daycare business following an automobile collision in which Appellee was found at fault in the jury trial that followed dismissal of Appellant’s claims from the multiple-party action prior to trial. Appellant argues the Trial Court erred in revisiting and granting Appellee’s previously-denied motion for summary judgment on the day of trial, and seeks an opportunity to submit to a jury claims for damages relating to an economic downturn allegedly suffered by Appellant following the

collision. For the reasons set forth below, the summary judgment of the Trial Court is reversed, and this cause of action remanded for trial as to Appellant's claims for damages.

### **BACKGROUND**

On November 13, 1995, a car driven by Appellee Rodney Parton ("Parton") collided at an intersection in Maryville, Tennessee with a passenger van owned by Olympia Child Development, Inc. ("Olympia") and driven by Lisa K. Murphy, an employee of Olympia's daycare center. Passengers in the van were several children who were attendees at Appellant's daycare center. Parton had a passenger, his brother Tony Parton, in the car he was driving, and the car was titled to Zula Parton, Parton's mother. At the time of the collision, Parton, an off-duty Maryville police officer, was pursuing another vehicle he alleges ran him off the road. Suit was filed by Kevin and Sherri Clendenen, the parents of one of the children injured in the collision on May 28, 1996, naming as defendants, Parton, his mother Zula Parton as owner of the car driven by Parton, Lisa K. Murphy, and Olympia. Lisa K. Murphy and Olympia filed a cross-complaint against Rodney Parton and Zula Parton, setting forth claims for among other things, economic losses relating to the accident at issue. Various other complaints, cross-complaints, counter-complaints, and third-party complaints were filed by Rodney Parton against Lisa K. Murphy and Olympia; Tony Parton and his wife Tania Parton against Rodney Parton, Lisa K. Murphy and Olympia; Olympia against the City of Maryville as the employer of Parton; and Melissa Tidwell as mother of one of the children in the van against Parton. The Clendenen claims were settled prior to trial.

Although there is a significant amount of pretrial litigation in the record below, the Trial Court's actions material to this appeal center upon Parton's motion for summary judgment against Olympia and Parton's motion in limine to exclude certain evidence and argument by Olympia. Styled "Partial Motion for Summary Judgment," it appears that the motion filed September 17, 1998 was presented in its entirety under T.R.C.P. Rule 56, with the relief sought comprising the "partial" aspect. Parton's motion sought summary judgment as to Olympia's claims against him for economic losses and injury to business reputation, asserting that Olympia could not establish proximate cause for these claims. Olympia responded and filed the affidavit of Debora J.

Dunn, a corporate officer for Olympia. By Order filed February 5, 1999, the Trial Court denied the motion and taxed related costs to Parton.

Parton filed several motions in limine on February 5, 1999, the Friday before the February 9 trial date. At a hearing on the morning of trial, the Trial Court granted Parton's motions, which included exclusion of evidence relating to testimony by Maryville Police Chief Terry Nichols concerning when Parton was informed of the identity of the driver of the car he was pursuing at the time of the collision, statements made by the driver of the car pursued (who was deceased at the time of the motion), evidence and testimony relating to an incident where Parton "allegedly engaged a Maryville police officer in a pursuit while operating his privately owned vehicle," Parton's performance evaluations in police field training, lay testimony concerning medical expenses, and "barring Plaintiffs from presenting any argument, evidence or testimony regarding economic loss of Olympia Child Care Development Center, Inc." On the morning of Trial, Parton filed another motion in limine, citing additional materials, including the Tennessee Pattern Jury Instructions, to exclude evidence relating to Olympia's lost business profits. After granting the motions in limine and on oral motion of Appellee at this hearing, the Trial Court dismissed Olympia's claims before trial. Following the subsequent trial with the remaining parties on the issues of negligence, the jury found in favor of remaining plaintiffs Lisa K. Murphy and Melissa Tidwell, by special verdict allocating no fault to Lisa K. Murphy and Olympia, and one hundred percent of fault in the collision to Parton. The Trial Court on February 18 filed a Judgment on Verdict of Jury, confirming the verdict, setting out the damages awarded, and dismissing all claims by Parton and Tony Parton against Olympia. On February 19, Olympia filed a Motion for Proffer, seeking a hearing to present testimony relating to Olympia's economic damages claim. Subsequent Orders dismissed all claims against Zula Parton with prejudice, denied a motion filed before trial for the jury to view the accident scene, and entered a non-suit with prejudice as to claims by Tony Parton and Tania Parton against Parton. By Order of Dismissal entered March 24, 1999, the Trial Court entered summary judgment as to all claims of Olympia against Parton. It is from this summary judgment that Plaintiff appeals.

#### **DISCUSSION**

While somewhat unclear from the record, it appears that the Trial Court revisited and granted the previously-denied motion for summary judgment filed by Parton dismissing Olympia's claims. The standard of review on appeal of a Trial Court's grant of Summary Judgment is well established.

Our review of the trial court's grant of summary judgment is purely a question of law; accordingly, our review is de novo, and no presumption of correctness attaches to the lower courts' judgments. A summary judgment is appropriate only if the moving party shows that no genuine and material factual issue exists and that he or she is entitled to relief as a matter of law. In reviewing the record to determine whether summary judgment requirements have been met, we must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). A summary judgment may be proper, therefore, only "when there is no dispute over the evidence establishing the facts that control the application of a rule of law." *Id.* at 214-15; Tenn. R. Civ. P. 56.

*Eyring v. Fort Sanders Parkwest Medical Center*, 991 S.W.2d 230, 236 (Tenn. 1999).

Olympia raises on appeal the issue of error by the Trial Court in granting summary judgment in favor of Parton, along with the related claim of error in granting Parton's motions in limine to exclude evidence relating to Olympia's claims for economic loss from the collision. The action of the Trial Court dismissing Olympia's claims is unusual from a procedural standpoint. The Order of Dismissal references a motion raised February 9, 1999, the trial date. This is not a directed verdict. Olympia was not allowed to present any proof at trial on its claims. The parties agree that the Trial Court granted a motion raised orally prior to trial and not appearing in the record, such motion apparently based upon the grant of Parton's motion in limine to exclude all testimony, evidence, and argument relating to Olympia's claims. Its claims having been dismissed from the cause of action prior to commencement of trial, Olympia had no opportunity to make an offer of proof at trial, even though witnesses apparently were present and prepared to testify, and supporting exhibits prepared. The record on appeal does not contain an Order relating to Olympia's subsequent motion to proffer proof relating to its claims. Thus, the only proof in the record on these issues is to be adduced from the pretrial litigation, including the summary judgment motion filed by Parton and previously denied by the Trial Court.

This appeal addresses only the Trial Court's actions relating to Olympia's claims --

the two motions in limine to exclude Olympia's proof and the subsequent summary judgment dismissing Olympia's damage claim from the suit. It appears from the record that the Trial Court's initial denial of Parton's motion for summary judgment as to Olympia's claims was correct.

The moving party has the initial burden of producing evidence to support its summary judgment motion. A party may move for summary judgment on the ground that the opposing party will be unable to produce sufficient evidence at trial to withstand a motion for directed verdict. However, the motion must be supported by more than a mere conclusory assertion that the plaintiff cannot prove its case. In order to satisfy its burden, the moving party must produce or point out evidence in the record which, if uncontradicted, entitles the movant to a judgment as a matter of law.

*Burgess v. Harley*, 934 S.W.2d 58, 62 (Tenn. Ct. App. 1996)(citations omitted).Parton's motion for summary judgment as to Olympia's claims focused on allegations that Olympia would not to able to produce sufficient evidence at trial to survive a motion for directed verdict. Parton cited no evidence, merely making conclusory statements of law. Olympia responded with the affidavit of Debora J. Dunn, a corporate officer for Olympia, setting forth sufficient issues of material fact to contradict the moving party. Dunn averred, among other things, direct economic loss relating to parents who had a child on Olympia's van at the time of the collision withdrawing the child from the daycare, and averring the collision as the reason for the withdrawal.

Parton's motions in limine to exclude all testimony, evidence, and argument on the issue of Olympia's damages were based upon assertions that Olympia would not be able to meet the element of proximate cause through the testimony of Olympia's accountant, Burl Nelson. In his deposition made exhibit to the record below, the accountant testified that Olympia had suffered economic losses, that in his opinion the economic losses were related to some particular event or events, and that the losses were temporally related to the collision. The accountant said he could not, however, state that the collision was the particular causal event. Parton based the February 5 motion in limine on a conclusory argument that the accountant could not establish proximate cause. It was error for the Trial Court to exclude the otherwise admissible testimony and evidence of the accountant because, while the accountant could not state that the collision was the cause in fact or proximate cause of Olympia's damages, he could establish another requisite element of negligence in the nature and extent of Olympia's damages. The motion in limine filed on the day of trial cited

no evidence, only making additional conclusions of law. The exclusion of the accountant's testimony and related evidence did not establish that Olympia would be unable to produce sufficient evidence at trial to withstand a motion for directed verdict as to the cause in fact and proximate cause.

Summary judgment is not a substitute for the trial of issues of fact. Determinations of credibility, the weight to be given evidence, and the inferences to be drawn from facts proven are jury functions. When ruling on a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and disregard all opposing evidence. The evidence of the non-movant is taken as true and all reasonable inferences in the non-movant's favor will be allowed. Summary judgment is not a disfavored procedural device and may be used to conclude any civil case, including negligence cases, that can be and should be resolved on legal issues alone, but, as a general rule, negligence cases are not amenable to disposition on summary judgment.

*Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997).

Once again, we note that this is a case concerning damages alleged to have resulted from the negligence of Parton in the collision November 13, 1995. On the day of trial, when the Trial Court dismissed Olympia's claims, it appears from the record that witnesses were present and prepared to testify as to the existence of damages, and the cause of those damages. In taking this action, the Trial Court substituted its own judgment on the jury functions of determinations of credibility of witnesses, the weight to be given evidence, and the inferences to be drawn from facts proven at trial. This action was taken by the Trial Court without the Trial Court's having full knowledge of what those witnesses, other than Olympia's accountant, would testify to at trial. With a jury empaneled, all parties and witnesses to the cause of action present, and additional apparently admissible evidence prepared and available for submission to the jury, there was no conservation of judicial resources in dismissing the claims of Olympia minutes before trial. Trial was held, liability as to damages of the other parties established, the amounts of damages determined, and special verdict rendered by the jury.

As to Parton's assertions that there could be other causes, without any proof that Olympia's damages came from another source, summary judgment was inappropriate. In *McCarley v. West Quality Food Service*, 960 S.W.2d 585 (Tenn. 1998), a motion for summary judgment

alleging failure to establish the element of causation was reversed in a negligent food contamination case. The Supreme Court found that the restaurant's assertions of possible alternative sources of the plaintiff's injury did not remove the restaurant's food from the list of possible causes. This created a genuine issue of material fact as to causation to be resolved by the trier of fact, and not by summary judgment. *Id.* at 588. In the case before us, Parton has failed to remove the collision from the list of possible causes of Olympia's damages as established in the affidavit of the accountant. Parton produced no evidence concerning possible alternative causes and merely submitted argument in the form of conclusions of law without factual support in the record.

As previously noted, the jury's special verdict form named Olympia and Lisa K. Murphy as to allocation of fault in the collision, along with Parton. In this capacity, although the Trial Court's action removed Olympia's claims, Olympia remained in the trial as a potentially-liable party in the collision, and retained privity with its employee, Lisa K. Murphy, who, through the pleadings filed by Parton and others, was a party to the proceedings below both in her personal capacity and as an employee of Olympia.

The term "res judicata" is defined as a "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.... [T]o be applicable, it requires identity of cause of action, or person and parties to action, and of quality in persons for or against whom claim is made." [ ] We have recently discussed the doctrine and its related counterpart, collateral estoppel, as follows:

The doctrine of res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. Collateral estoppel operates to bar a second suit between the same parties and their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit.

[ ] Res judicata and collateral estoppel apply only if the prior judgment concludes the rights of the parties on the merits. [ ] One defending on the basis of res judicata or collateral estoppel must demonstrate that 1) the judgment in the prior case was final and concluded the rights of the party against whom the defense is asserted, and 2) both cases involve the same parties, the same cause of action, or identical issues.[ ]

*Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995).

As there is a final judgment below between the parties to this appeal, Parton and Olympia, as to liability in the same cause of action, the collision, a second trial on the issues

previously litigated is barred. However, it is Olympia's claims for damages resulting from Parton's negligence in the collision, and not the negligence of the parties, that is before us on appeal, and those claims were not litigated below.

The elements of a cause of action based on negligence are duty, breach of duty, cause in fact, loss or injury, and proximate cause. *Haynes v. Hamilton*, 883 S.W.2d 606, 611 (Tenn. 1994). On remand, the issues of duty and breach of duty relating to the collision are precluded by the jury verdict and judgment previously entered allocating full fault to Parton. The only issues left on remand are whether Olympia has a loss or injury from the collision, and whether Parton's negligence constitutes the cause in fact and proximate cause of Olympia's damages, if proven. "[I]t is common practice for a civil case to be remanded and retried on only the issue of damages." *Ennix v. Clay*, 703 S.W.2d 137,139 (Tenn. 1986).

Although Parton is correct that the accountant's testimony, as evidenced by his deposition cited in the motion *limine*, does not establish cause in fact or proximate cause, it does establish a loss or injury to Olympia. The affidavit of Debora J. Dunn, filed in response to Parton's motion for summary judgment, arguably establishes genuine issues of material fact as to whether the negligence of Parton is the cause in fact of the business losses established by the accountant's deposition testimony. Parton asserted in the motions in *limine* that the link between the collision and Olympia's economic losses was speculative and that Olympia's economic losses could be from another cause.

It is true, as pointed out by defendants, that a superseding, intervening cause can break the chain of causation. In this regard, we have stated that

[t]here is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result. An intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct was a substantial factor in bringing about the harm. [ ]

Proximate cause, as well as the existence of a superseding, intervening cause, are jury questions unless the uncontroverted facts and inferences to be drawn from the facts make it so clear that all reasonable persons must agree on the proper outcome.

*McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 905 (Tenn. 1996).

Olympia was not allowed to present proof at trial as to the relevant elements of Parton's negligence, other than the affidavit filed in response to the motion for summary judgment. Parton offered no proof to controvert Olympia's allegations of damages resulting from Parton's negligence. The only uncontroverted facts are those proffered by Olympia, with those facts being an insufficient basis upon which to grant Parton summary judgment. Based on the record below, the issues raised by Parton as to possible intervening or superceding causes of Olympia's damages, as well as proximate cause, are questions for the jury, or at least are sufficient to require a trial rather than summary judgment. The Orders of the Trial Court granting Parton's motions in limine against Olympia and dismissing Olympia's claims from the cause below are reversed.

### **CONCLUSION**

The ruling of the Trial Court on the two motions in limine excluding testimony, evidence, and argument as to Appellant Olympia Child Development, Inc.'s allegations of damages is reversed, the Order of the Trial Court dismissing the claims of Appellant Olympia Child Development, Inc. against Rodney Parton is reversed, and this cause remanded for trial only on the issues of damages, cause in fact, and proximate cause, with the jury's allocation of fault as already determined not to be relitigated. Costs of this appeal are taxed to Appellee, Rodney Parton.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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CHARLES D. SUSANO, JR., J.